

TO: NIH 1102 Community

FROM: Robert F. Coen
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SUBJECT: ECS III Use of Indefinite Delivery Orders – Options and Terminations

The Electronic Commodities Store III (ECS III) government-wide acquisition contract was established for acquiring commercial items that meet the needs of the NIH and other federal agencies. Recently, several questions have been raised in regards to “Indefinite Delivery Orders” as it relates to the use of Options and Terminations. The following are significant terms and conditions under the contract:

- (1) The contracting officer may award delivery orders under the contract as the clauses prescribed at 52.216-22 Indefinite Quantity permit the issuance of delivery orders under the parent IDIQ contract. This clause can be found in the ECS III contract Part III Section B.
- (2) The contracting officer may include options in delivery orders. Such delivery orders should include the appropriate provisions and clauses prescribed in FAR 17.208 when the use of options in the order is determined to be in the government’s best interest. As provided in FAR 17.208, the government has the unilateral right whether to exercise an option. FAR 17.207 address notifications of intent to exercise an option should the government decide to exercise an option.
- (3) The contracting officer shall refer to FAR 12.302 when tailoring of provisions and clauses for the acquisition of commercial items. Tailoring shall be by addenda to the delivery order.

The contracting officer shall indicate in Block 27a of the 1449 if addenda are attached. These addenda may include, a continuation of the schedule of supplies/services to be acquired from blocks 18 through 21 of the SF 1449; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF 1449; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts, warranties, contract financing arrangements, etc.).

Because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government’s acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at [52.212-1](#), Instructions to Offerors- Commercial Items, and the clause at [52.212-4](#), Contract Terms and Conditions -- Commercial Items, to adapt to the market conditions for each acquisition.

The following paragraphs of the clause at 52.212-4, Contract Terms and Conditions -- Commercial Items, implement statutory requirements and shall not be tailored --(1) Assignments;(2) Disputes;(3) Payment; (except as provided in [Subpart 32.11](#))(4) Invoice;(5) Other compliances; and (6) Compliance with laws unique to Government contracts.

The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the market place, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

(4) The government has the right to terminate a delivery order, or any part, either for the government's convenience or for cause.

The clause at [52.212-4](#) permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in [52.212-4](#) entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, the requirements of Part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in 52.212-4. Furthermore, Contracting Officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in [52.212-4](#).

What does this mean at the delivery order level? The ordering Agency has the authority to include options and rights under the commercial items clause (FAR 52.212-4) to terminate a contract for the convenience of the Government. In fact, all terms and conditions under the master contract apply to all delivery orders placed by the ordering Agency.

If you have any questions or concerns in regards to the information provided above please contact our NITAAC Customer Support Center at 1-888-773-6542 or via email NITAACSupport@nih.gov.

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